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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 765.

LILY CLAPIER,

Petitioner,

against

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and NATIONAL RADIATOR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS AND FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for the Respondents.

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Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported, but printed copies have been filed with the Record. The opinion of the District Court is not yet reported, but appears at page 79 of the Record.

Jurisdiction.

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347a).

Introductory Statement.

The present petition is one of three applications by holders of approximately 2% in aggregate of the total outstanding indebtedness of National Radiator Corporation for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Third Circuit filed March 24, 1933, affirming a final decree of sale and the decree confirming the sale of the property of the debtor corporation, in a suit instituted in the United States District Court for the Western District of Pennsylvania by the respondents as holders, under a Reorganization Plan, of more than 95% of the total outstanding indebtedness of said corporation. The two other applications are entitled, respectively, "First National Bank of Cincinnati and International Heater Company, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at Nos. 962-963, and "Amy Arzt and Josephine Ramsey, Petitioners, against Rudolph B. Flershem, et al., as the Reorganization Committee, etc., and others, Respondents," at No. 964.

The decision of the United States Circuit Court of Appeals, sought now to be reviewed, disposes of two appeals in the main proceeding below (entitled "Rudolph B. Flershem, et al., as the Reorganization Committee, etc., Complainants, against National Radiator Corporation, Defend-

ant, at No. 2558 In Equity") and the petitioner's separate appeal from a decree of the United States District Court for the Western District of Pennsylvania dated May 31, 1932, dismissing the petitioner's bill of complaint in a dependent suit, on the ground that "said bill does not state facts constituting a cause of action, and is without equity" (R. 82). By this dependent bill, the petitioner attacked the jurisdiction of the District Court to appoint receivers by its decree entered October 9, 1931 (R. 71), in the main proceeding. We respectfully request leave to refer to our two briefs in the separate applications for certiorari in the main proceeding, with the same effect as if the pertinent matters therein were set forth at length in this brief, in so far as the petitioner in her present petition presents for review the same questions presented in the companion petition of Amy Arzt and Josephine Ramsey, at No. 964.

ARGUMENT.

I. The petitioner's dependent bill was properly dismissed on the ground that it appears on the face of said bill that it does not state facts sufficient to constitute a cause of action and is wholly without equity.

The sufficiency of the petitioner's dependent bill must be determined by an examination of that bill itself. A reference to it shows its charges of fraud and collusion to be couched in language so general as to fail to state facts sufficient to constitute a cause of action. "A wholesale charge of fraud and collusion does not satisfy the degree of

particularity and definiteness required by the rules of pleading."

Rospigliosi v. *New Orleans M. & C. R. Co.* (C. C. A. 5th Cir., 1916), 237 Fed. 341, at 345.

So far as concerns the petitioner's contention that the sufficiency of her dependent bill is supported by the insufficiency of the bill of complaint in the main proceeding (which is made a part of her dependent bill), we submit that the bill of complaint in the main proceeding does state a good cause of action in equity, warranting the appointment of receivers. It conforms fully to the principles frequently enunciated by this Court and the Circuit Courts of Appeals in numerous cases, among others, the following:

Re Metropolitan Railway Receivership (1908), 208 U. S. 90;

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.* (S. D. N. Y., 1922), 281 Fed. 265;

In re Babcock (C. C. A. 7th Cir., 1928), 26 Fed. (2d) 153.

The bill of complaint (with its exhibits) in the main proceeding shows the debtor corporation to have suffered losses of about $1,250,000 or $1,300,000 a year (R. 50); that its interest and sinking fund charges amounted to $1,107,852 a year (R. 34); that if payment of these fixed charges were continued, it was a matter of a short time only before all cash resources of the debtor would be utterly exhausted (R. 16), and that insolvency in every sense of the word was inevitable and, at the time the bill was filed, was imminent (R. 16).

The fact that the Plan of Reorganization had been issued prior to the receivership presents no element of novelty in legal principle. Nor does the fact that the debtor's board of directors had in principle approved some form of reorganization. The normal eventual result of practically every equity receivership of a large corporation is reorganization. Every corporation which admits the allegations of the conventional creditors' bill and consents to the appointment of receivers knows that it is, in effect, consenting to a reorganization, which presumably will be dictated by its creditors and will involve a scaling down of fixed charges. While in the ordinary case the plan of reorganization may not be promulgated or even formulated at the time the creditors' bill is filed, the plan is always promulgated before the entry of a final decree. What the creditors propose to do with their debtor's property, if they get it, does not condition their right to relief. Said Judge Hough in *Conley* v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286, at 288:

> "It is certainly a curious conception of practice which leads a small body of shareholders to seek to answer a foreclosure bill merely because they are dissatisfied with what the foreclosing complainant says out of court it hopes or even intends to do after the final decree is procured."

II. The questions presented for review by the present petition relate to matters which have transpired or been disposed of subsequent to the filing of the petitioner's dependent bill.

The petitioner's dependent bill was filed December 11, 1931 (R. 2); the respondents Reorganization Committee filed their motion to dismiss the same January 19, 1932

(R. 77); the District Judge, simultaneously with his opinion in the main proceeding, handed down a separate opinion May 31, 1932, accompanying the decree dismissing the petitioner's dependent bill of complaint. In that opinion he said in part (R. 81):

> "An examination of the bill of complaint has convinced us that the motions of the defendants should be sustained. The bill is couched in the most general terms and, while charging improper collusion between the defendants, sets out nothing in a specific way from which any fraud upon complainant is to be inferred.
>
> "Incidentally, we may say that we have heard like charges in the original case (No. 2558 In Equity), but the evidence did not tend to sustain them. We shall this day file a decree in that case. The evidence indicates that the primary suit was along conventional lines. See *Continental &c. Trust & Savings Bank* v. *Allis-Chalmers Co.*, 200 Fed. 600; *In re Babcock*, 26 Fed. (2d) 153; *Re Metropolitan Railway Receivership*, 208 U. S. 90; *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626; *Guaranty Trust Co.* v. *C. M. & St. P. Ry. Co.*, 15 Fed. (2d) 434.
>
> "We are entirely satisfied that the original case was within the jurisdiction of the court, and that the appointment of receivers therein was justified."

As appears from the Record in the main proceeding, Bankers Trust Company, as Trustee and judgment creditor for the sum of $11,674,240.21, subsequent to the filing of the petitioner's ancillary bill, intervened in the main proceeding January 9, 1932, joined in each and every prayer for relief contained in the original bill of complaint in the main proceeding, including the prayer for a sale of the

debtor's property, and, by the District Court's decree entered May 31, 1932, such property has been sold. The receivership to all intents and purposes has thereby been concluded. Whatever may have been the jurisdiction of the District Court to appoint receivers for the debtor's property, its jurisdiction to decree and to confirm the sale thereof (by way of equitable execution of the judgment creditor's claim) is not under attack in this dependent suit.

As an aid to final process, the appointment of Federal equity receivers in a proper case is necessarily "due process".

Re Metropolitan Railway Receivership (1908), 208 U. S. 90;

Superior Oil Corporation v. *Matlock* (C. C. A. 10th Cir., 1931), 47 Fed. (2d) 993;

Hatch v. *Morosco Holding Co.* (C. C. A. 2nd Cir., 1931), 50 Fed. (2d) 138;

Kingsport Press, Inc. v. *Brief English Systems, Inc.* (C. C. A. 2nd Cir., 1931), 54 Fed. (2d) 497.

Thus, in reality no constitutional question is presented. This Court has heretofore refused to entertain an appeal from a decree dismissing a dependent bill, when jurisdiction for the dependent suit rested solely upon its dependent nature, as here, and the late attempt to raise a constitutional question did not avail to sustain an appeal to this Court, in

Carey v. *Houston & Texas Central R. R. Co.* (1896), 161 U. S. 115.

The petitioner has disclosed no error requiring review by this Court.

The specifications of error made in the petitioner's brief at page 14 are directed to the Record in the main proceeding, which is not the subject of review in the petitioner's present application from the decree of the Circuit Court of Appeals in affirmance of the District Court's decree, which dismissed her dependent bill.

CONCLUSION.

The petition for writ of certiorari should be dismissed with costs.

Respectfully submitted,

LAWRENCE BENNETT,
MAYNARD TEALL,
G. FRANKLIN LUDINGTON,

Counsel for Respondents RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.